



Antitrust Regulation in Latin America

Although traditionally antitrust enforcement in Latin America has been weak and sporadic, the level of antitrust enforcement has increased recently with the economic liberalization. The importance of regulation stems from the fact that the economic model in vogue in Latin America until the late 1970s generated a highly protected and concentrated domestic industry in which anticompetitive practices were commonplace. The liberalization of Latin American economies could require a crackdown on anticompetitive practices, especially on price-fixing and collusion.

The opening of economies to international competition should be an important corrective mechanism. Antitrust enforcement will still be necessary, however, in those areas that remain heavily concentrated after liberalization. Typically, areas where heavy capital outlays are necessary to enter the market and where few enterprises were present before the opening of the economy will need to be subject to tighter scrutiny. Furthermore, as the economies of the region open to international competition, domestic companies face competitive pressure either to form alliances with foreign (usually large multinational) companies desiring to enter the market or with other domestic companies to meet international competition. As a result, the review of mergers and acquisitions by government bodies will probably increase. In their review of proposed mergers and acquisitions, these bodies will need to determine whether the relevant market is the domestic market, a subregional market, such as the Andean Pact or Mercosur, or the worldwide market. As is the case with other forms of government intervention in the economy, it is possible that these bodies may misuse their authority and block the entry of international competitors by not authorizing their acquisition

Note: The American Bar Association grants permission to reproduce this article in any not-for-profit publication or handout provided such reproduction acknowledges original publication in this issue of *The International Lawyer* and includes the title of the article and the name of the author.

*The author is a member of the international practice group of Curtis, Mallet-Prevost, Colt & Mosle, New York, New York.

of domestic companies that supply the necessary operational capacity or local expertise.

This article reviews the antitrust laws of Argentina, Brazil, Chile, Colombia, and Mexico. Whereas in Argentina the antitrust law adopts a rule of reason approach, in Chile antitrust violations stem from conduct that has been considered per se illegal by the enforcement bodies, while other violations require a rule of reason determination. In Brazil the antitrust law requires a showing of market power, with a 20 percent market share threshold (recently reduced from the original 30 percent). Mexico adopts a mixed system of rule of reason and per se violations. Colombia represents a jurisdiction where antitrust enforcement remains largely unknown. The Andean Pact competition regulation, which is inactive, is reviewed in the section on Colombia.

I. Competition Regulation in Argentina

Antitrust regulation has seldom been enforced in Argentina, even though antitrust laws have been on the books for more than sixty-five years.¹ With the strong liberalization measures adopted by the current government, antitrust enforcement could increase. Antitrust is often seen as complementing privatization, by preventing abuses of market power by newly privatized industries without having to resort to direct regulation of prices and quantities. However, it is also likely that the market power of domestic economic units will decrease as the economy is opened to foreign competition, thus making the active enforcement of the antitrust laws less necessary or even undesirable.

One explanation for Argentina's failure to actively enforce its antitrust laws is the high evidentiary burden required to prove a violation. For conduct to constitute a violation of the antitrust laws, it must have the effect of restricting competition. A showing of market impact is required and there are no per se violations. This showing would normally require fairly complex economic data, the use of concentration indices, and the like. To date, there is no official indication of the type of measures that would be used. Furthermore, the administration of a rule of reason system is much more demanding technically, procedurally, and financially.

A. REGULATION OF COMPETITION

The Competition Law contains a broad provision prohibiting conduct that restricts, distorts, or limits competition, or that constitutes an abuse of a dominant position in the market.² A person or company is said to have a dominant position in the market when it is the only purchaser or supplier of a particular product

1. Investing, Licensing and Trading Conditions Abroad: Argentina (Economist Intelligence Unit) § 5.1 (1995).

2. Ley 22.262 de Defensa de la Competencia [Competition Law] art. 1 (Aug. 1, 1980).

or service or when it is not subject to "substantial competition" in all or part of the country.³ The Competition Law focuses on behavior that has the effect of restricting competition. However, it creates an exception for practices undertaken pursuant to a legal authorization or command.⁴ This defense can be invoked especially in cases involving patent holders or public enterprises.⁵ This exception only reaches practices legally validated⁶ and does not extend to other practices of the same entity.⁷

1. *Specific Prohibitions*

The Competition Law contains the following nonexhaustive list of practices that are violations if they have the effect of restricting competition:⁸

- Price-fixing through agreements or any form of concerted action;⁹
- fixing, influencing, or changing market prices;¹⁰
- concerted action to establish minimum quantities, discounts, or other conditions for the sale of goods or services;¹¹
- sharing information on prices or conditions of sale in order to promote concerted action to restrict competition;¹²
- any agreement or concerted action allocating clients or territories among competitors;¹³
- agreements or concerted action to allocate markets or suppliers among competitors;¹⁴
- concerted action to limit or control the production or distribution of goods or services;¹⁵

3. *Id.* art. 2.

4. *Id.* art. 5.

5. Jorge Otamendi, *Criterios de la Comisión Nacional de Defensa de la Competencia*, LA LEY 758-59 (1982-D).

6. Judgment of October 31, 1985 (Colegio de Martilleros y Corredores Públicos del Departamento Judicial de Mar de Plata), Buenos Aires SC (Arg.).

7. Otamendi, *supra* note 5, at 758.

8. Competition Law art. 41. Article 41 should be analyzed by reference to article 1, which prohibits all conduct having the effect of restricting competition. See, e.g., Alejandro Adrian Litvack, *La Obligación de Vender y la Ley de Defensa de la Competencia*, LA LEY 469 (t. 1992-C) (explaining that the article 41 provisions on refusal to deal should be analyzed in light of article 1, and, in particular, in light of the anticompetitive effects of the refusal).

9. The Competition Law does not prohibit the agreement as such, but regulates the anticompetitive effects that may result from such agreement or concerted behavior. This result is due to the fact that article 41 provisions should be read in the context of article 1, which requires an anticompetitive effect. See Jorge Otamendi, *Presupuestos Básicos Para la Aplicación de la Ley de Defensa de la Competencia*, LA LEY (1981-B).

10. Competition Law art. 41(a).

11. *Id.* art. 41(c).

12. *Id.* art. 41(k).

13. *Id.* art. 41(e).

14. *Id.*

15. *Id.* art. 41(b).

- concerted action to prevent investment or technological improvement in the production of goods or services;¹⁶
- agreements or any form of concerted action to prevent entry of competitors into the market;¹⁷ this prohibition extends to the concerted use of prices or other mechanisms to prevent entry;¹⁸
- concerted action to abandon or destroy products, crops, or livestock;¹⁹
- concerted action to stop operations in industries or mines;²⁰
- concerted refusals to fulfill particular product orders entered under existing market conditions, except when such refusals are part of "accepted commercial practice";²¹ this provision probably does not apply to exclusive dealing agreements between producers and distributors; a strong argument can be made that these exclusive dealing arrangements fall within accepted commercial practice;²²
- discrimination in the sale of products or services, except in cases where discrimination is dictated by accepted commercial practice;²³
- tying arrangements; the Competition Law prohibits linking a contract to the performance of obligations or operations that are not related to its object;²⁴ this is the only violation in the (nonexhaustive) list of prohibited practices that applies in situations where there is no concerted action; the other violations in this list of practices involve conduct undertaken in concert with other persons or companies.

2. Enforcement Procedures

The Competition Law is enforced through an administrative procedure that can lead to administrative sanctions and, or alternatively, to civil or criminal judicial proceedings. The administrative proceeding is initiated by the National Commission for the Defense of Competition (Commission) ex officio or upon a complaint presented by a private party.²⁵ The Commission is the body charged with antitrust enforcement in Argentina.

Once an administrative procedure is initiated, the party accused of a violation

16. *Id.*

17. *Id.* art. 41(f).

18. Cf. Horacio P. Fargosi, *Apostilla Sobre la Ley de Defensa de la Competencia*, ADLA XL-C 2533.

19. Competition Law art. 41(i), (j).

20. *Id.* It is not clear whether the prohibition of article 41, section k, against concerted action to stop operations of mines or industries would apply to oil production. The text uses the terms *establecimientos industriales* (industries) and *yacimientos mineros* (mines), which could be applied, albeit not without some imprecision, to the oil industry.

21. Competition Law art. 41(g).

22. There is no exact definition of accepted commercial practice. This definition must be determined on a case-by-case basis and is a factual rather than a legal question.

23. Competition Law art. 41(h).

24. *Id.* art. 41(d).

25. *Id.* art. 17.

has two weeks to explain its conduct. If the explanations are unsatisfactory, the accused may seek a voluntary settlement with the Commission. If no settlement can be reached, the Secretary of Commerce may issue an order to cease the violation, impose a fine, or issue a request to a court to proceed to liquidate the enterprise.²⁶ The decision of the Secretary of Commerce must include an explanation of the basis of the ruling,²⁷ and it can be appealed in federal court.²⁸ The Secretary of Commerce, in this context, serves as a second-instance administrative judicial board. The issue will go to the courts only after the administrative procedures have been exhausted, both in the Commission and with the Secretary of Commerce.

The directors, auditors, agents, and managers of companies that participated in a violation contemplated in the list of prohibited practices are subject to criminal prosecution.²⁹ Criminal action, however, can be initiated in the courts only by the Secretary of Commerce. Sanctions for these transgressions range from fines to a prison sentence for a maximum of six years. Criminal sanctions have seldom, if ever, been imposed for violations of the antitrust laws in Argentina.

The Competition Law provides a private cause of action to recover damages. Any person harmed by the anticompetitive actions contemplated in the Competition Law can bring an action to recover damages once an administrative decision by the Secretary of Commerce has been issued approving a settlement, imposing sanctions, or dismissing the charges.³⁰

3. *Other Provisions*

The Supply Law is closely related to past government policies of heavy intervention in the economy in the 1970s. Its objective is to set minimum prices for goods and services consumed by large sectors of the population. However, the Supply Law also contains provisions to prevent restrictions on the supply of goods or services in an economy with price controls. Some of the provisions in the Supply Law are per se violations, not requiring conduct of a monopolistic nature. The Supply Law prohibits unjustified price increases, hoarding of finished goods or raw materials, reducing supply in order to cause scarcity of a product, and unjustified refusals to deal.³¹ Transgressions of these provisions are punished by fines, suspension of trademark and patent rights, arrest, and temporary closure of the business.³²

26. *Id.* art. 26.

27. If an explanation of the basis for the ruling is missing, the decision can be annulled by the courts. Judgment of April 6, 1990 (*A Gas, S.A. y otras c. Agip Argentina, S.A. y otras*), C.N. Penal Económico, no. 89.017 (Arg.).

28. Competition Law art. 27.

29. *Id.* art. 42, § 2.

30. *Id.* art. 4.

31. Ley 20.680 [Supply Law] art. 4 (June 20, 1974), amended by RESOLUCIÓN 140 (1989).

32. *Id.* art. 5.

The Supply Law and the Competition Law overlap in several instances. In practice, the Competition Law provisions are more likely to be applied to regulate anticompetitive behavior. However, this remains an open issue. Because enforcement of these laws has been sporadic, it is difficult to predict how they will be interpreted and enforced in the future.

In keeping with the trend towards economic liberalization, the prices of the products covered by the Supply Law were liberated toward the end of 1989, except as to pharmaceutical products.³³ Although the Supply Law is still in force, its application has been drastically reduced. Further, it is unlikely that price controls will be adopted in the near future, given the free market orientation of the current administration.

In 1993 the Argentine Congress passed a new consumer protection law. Unlike the consumer protection laws of other countries in Latin America, this law does not regulate antitrust behavior as such. Nevertheless, it does require transparency with regard to product information supplied to the market, which in itself has a procompetitive effect.³⁴

B. MERGERS AND ACQUISITIONS

The Competition Law does not explicitly regulate mergers and acquisitions. The Competition Law prohibits conduct that restricts competition or that constitutes an abuse of a dominant position in the market. Accordingly, a merger or acquisition could be a violation of the general prohibitions contained in the Competition Law if it had the effect of restricting competition. The Competition Law probably has never been applied to prevent or alter a merger or acquisition.

The formal requirements for a merger are established in the Commercial Code.³⁵ The requirements for a merger include: a "prior commitment of merger" adopted by the representatives of the company containing information necessary for the shareholders to assess the convenience of the merger; a resolution approving the "prior commitment of merger" adopted in the same manner as an amendment to the corporate charter; and notice of the resolution by publication in a periodical of national circulation. Creditors have an opportunity to oppose the merger within fifteen days of notice and they may seek a judicial embargo against it.

C. RESALE PRICE MAINTENANCE

As a general principle, manufacturers can set the minimum or maximum prices at which their distributors must sell to the public. However, such action will not

33. RESOLUCIÓN 140 (1989).

34. Ley 24.240 de Defensa del Consumidor [Consumer Protection Law] (Sept. 22, 1993).

35. These requirements are set forth in the Corporations Law in arts. 82-83. For an English translation, see *COMMERCIAL LAWS OF THE WORLD: ARGENTINA* 53 (Foreign Tax L. Ass'n, rev. 1996).

be permitted if it limits, restricts, or distorts competition, or constitutes abuse of a dominant market position in such a way that it can be detrimental to general economic interests.

D. JOINT VENTURES

Joint ventures are permitted under Argentine law. They will violate the Competition Law only if they have the effect of restricting competition or if they abuse a dominant position. No specific provisions regulate the antitrust aspects of joint ventures in Argentina.

The formal requirements for joint ventures are set forth in the Argentine Corporations Law.³⁶ A joint venture contract must be in writing and must be registered in the Public Commercial Register. A copy of the contract must be sent to the National Commission for the Defense of Competition. The Commission can initiate an antitrust investigation if the joint venture appears to restrict competition or to assume a dominant position.

The Competition Law has seldom, if ever, been applied to prevent or alter a joint venture in Argentina.

E. APPLICABLE LAWS

- (i) *Ley 24.240 de defensa del consumidor*, of September 22, 1993 (Consumer Protection Law).
- (ii) *Ley 22.262 de defensa de la competencia*, of August 1, 1980 (Competition Law). The Competition Law prohibits various forms of abuse of market power.
- (iii) *Ley 20.680*, of June 20, 1974 (Supply Law), as modified by Resolución 140, of 1989. The Supply Law prohibits the manipulation of prices or quantities by producers or distributors. The Supply Law was modified in 1989 and currently applies only to pharmaceutical products.
- (iv) *Ley 19.550*, of April 25, 1972 (Corporations Law). The Corporations Law establishes the formal requirements for mergers and joint ventures.

II. Competition Regulation in Brazil

The Brazilian Congress approved a new antitrust law in June 1994, completely overhauling the previous legislation. Three statutes were revoked and the remaining ones were substantially modified. The prior Brazilian competition laws were repetitive and complex. They addressed widely different practices ranging from fiscal evasion to disobedience of government price controls, and from false advertising to the recognition of foreign patents. They also regulated dumping and included provisions to prevent selling at prices that were too high, at cost,

36. *Ley 19,550 [Corporations Law] arts. 367-383 (Apr. 25, 1972).*

or below cost. The new antitrust law simplified the regulatory framework and strengthened the mechanisms of enforcement of the antitrust laws.

Because of the close, and often criticized, relationship between the private sector and the state, antitrust enforcement in Brazil has traditionally been weak.³⁷ This relationship often forces enterprises to act collectively to negotiate concessions from the government. This collective action may have encouraged collusive behavior in the past.³⁸ Whether the current government will enforce the competition laws more forcefully is unclear, although indications are that antitrust enforcement will become more prevalent. The adoption of the new antitrust law by the Brazilian Congress seems to indicate a heightened awareness of the need for enforcement. In addition, the recent decision of the Administrative Council for Economic Defense (CADE), an administrative body with quasi-judicial functions in charge of antitrust enforcement, required the exclusion of the acrylic and polyester units as a condition to approving the acquisition of Sinasa, a polyester manufacturer, by Rhodia, a chemical products company. CADE concluded that the acquisition would generate a monopoly in the production of polyester.³⁹ In a more recent decision, CADE rejected a project by two asbestos companies, Brasilit and Eternit, which would have created a joint venture in Southern Brazil for the production of asbestos tiles and water tanks, on the grounds that the project would result in an increase in concentration that could harm competition nationwide.⁴⁰ These decisions, along with the enactment of the new law, may indicate a tougher and more active enforcement of antitrust law in Brazil.

The Brazilian competition laws were initially inspired by the American antitrust laws.⁴¹ The terms contained within the Brazilian laws are often clarified by reference to their meaning in English. In an early decision, for example, the notions of vertical, horizontal, and conglomerate integration were defined in English by citing an American textbook.⁴² In another decision, "vertical integration" was defined by making reference to an American antitrust text,⁴³ and the judge cited the book of two American professors, considering them "experts" in the field of antitrust.⁴⁴ In another decision, the judge used the criteria set forth in the American *Alcoa* case⁴⁵ to establish that vertical integration that seeks to control

37. "Despite the antimonopoly laws, Brazil in fact has a long history of encouraging anti-competitive practices." Investing, Licensing and Trading Conditions Abroad: Brazil (Economist Intelligence Unit) 14 (1993).

38. 64 Antitrust & Trade Reg. Rep. (BNA) 504 (Apr. 29, 1993).

39. See *Brazil: Competitive Pit Bull*, BUS. LATIN AM., Nov. 7, 1994.

40. For a review of this case, see Camila D.M.P. de Araujo & Jaime E. Fernandez, *New Brazilian Antitrust Law*, INT'L FIN. LAW REV. 61 (Apr. 1995).

41. FRANCESCHINI & FRANCESCHINI, *PODER ECONOMICO: EXERCICIO E ABUSO, DIREITO ANTITRUSTE BRASILEIRO* 1 (1985).

42. Judgment of June 9, 1971, Processo Admin. no. 6 (Arg.); FRANCESCHINI, *supra* note 41, at 61.

43. FRANCESCHINI, *supra* note 41, at 63.

44. *Id.*

45. 148 F.2d 416 (2d Cir. 1945).

the upstream or downstream markets can be a violation of the antitrust laws.⁴⁶ Considering the frequent references to American authors, it would not be surprising if Brazilian laws in the future applied numerical indexes or other criteria applied in the United States to measure concentration. CADE, for example, has applied the Herfindahl-Hirschmann Index to determine the existence of high levels of concentration in national or local markets.

A. REGULATION OF COMPETITION

For organizational purposes this section is divided according to the enforcement body. Section 1 contains a description of the practices regulated by the competition laws. Section 2 deals with the institutional and procedural framework of enforcement.

1. *Practices Regulated by the Competition Laws*

a. Practices Enforceable Directly in Criminal Court

Law 8.137/90 establishes criminal sanctions for violations against "the economic order." It prohibits abuses of market power⁴⁷ where acquisitions or mergers with competing enterprises are carried out with the intent to cease or reduce production or impede the functioning of a competing enterprise.⁴⁸ In Brazil, market power had previously been defined as the power to determine prices in a market.⁴⁹ The law enacted in 1994 defines market power as the control of a substantial portion of the market by an enterprise or group of enterprises.⁵⁰ The 1994 law (as modified) establishes a rebuttable presumption that market power exists whenever the control extends to 20 percent or more of the relevant market. If this definition of market power contained in the new law is applicable to Law 8.137/90, then the criminal practices requiring market power are not criminal violations whenever the enterprise controls less than 20 percent of the relevant market.

Regardless of market power, it is a criminal violation to enter into the following agreements or collusive arrangements: (a) to fix prices; (b) to allocate markets; (c) to control sources of supplies or channels of distribution to the detriment of

46. Judgment of Mar. 22, 1971, Processo no. 20.049 (Arg.); FRANCESCHINI, *supra* note 41, at 96-97.

47. Referred to in the law as "dominant position."

48. Law 8.137/90, art. 4.

49. Judgment of June 9, 1971, Processo Admin. no. 6 (Arg.); FRANCESCHINI, *supra* note 41, at 143. Although the decisions cited by Franceschini deal with the 1962 antitrust law, because of the technical nature of the field, it is likely that many of the notions contained therein also apply under the newer statutes. This article cites the relevant decisions from Franceschini to interpret the language of the newer antitrust laws. Administrative and judicial decisions do not have the force of law in Brazil and should only be considered as valuable guidelines to interpret the competition laws.

50. Law No. 8.884, of June 11, 1994, art. 20, §§ 2, 3, *amended* by Law 9.096/95 [hereinafter Law 8.884/94].

competition; (d) to hoard or destroy products in order to create a monopoly; or (e) to set prices in order to harm competitors.⁵¹ It is likewise a crime to tie the sale of a product or service to the purchase of a different product or service; to favor, without adequate justification, one purchaser over another (unless one of the purchasers is a distributor of the producer's goods); or in the case of goods that are subject to price controls, to sell at a price that is higher than the official price.⁵² All of these criminal violations require a mental state equivalent to scienter.⁵³ The enforcement of the criminal provisions in Law 8.137/90 is assigned to the criminal courts. However, enforcement of these provisions is relatively rare.

b. Practices Enforced by CADE

Law 8.884/94 provides that it is a violation of the "economic order,"⁵⁴ regardless of intent, to engage in any conduct with the effect of the following: (i) harming competition; (ii) dominating the relevant market of goods or services; (iii) increasing profits in an arbitrary manner, unless the company's position in the market is a result of a "natural competitive process;"⁵⁵ and (iv) abusing a dominant position in the market.⁵⁶ "Market domination" implies that an enterprise or group of enterprises controls a substantial share of the relevant market.⁵⁷ The statute (as modified) establishes the presumption that the control of 20 percent of the market constitutes a dominant position.⁵⁸ The violation of increasing profits in an arbitrary manner has been interpreted in decisions under previous statutes to encompass any situation in which one of the parties arbitrarily sets the price, that is, when there is no participation of the other parties in the formation of the price.⁵⁹

Law 8.884/94 includes a list of practices that constitute a transgression whenever they fall within the categories contemplated in (i), (ii), (iii), or (iv), described above. These practices include:

- price-fixing and other forms of concerted behavior among competitors;
- creating obstacles to the formation or development of a competing enterprise;
- erecting barriers to the entry of competitors;

51. Law 8.137/90, art. 4.

52. *Id.* arts. 5-7.

53. *Id.* art. 7, *paragrafo unico*.

54. *Ordem Economica*.

55. Law 8.884/94, art. 20, § 1.

56. *Id.* art. 20.

57. *Id.*

58. The 30% threshold originally in the law was changed to 20% by Provisional Measure No. 911 of February 21, 1995, and permanently incorporated into the antitrust law by Law 9.069/95.

59. Sentença de 29.10.41, do Juiz do TSN Pedro Borges, no Porc. n. 1765, In RF 89/217 e ss; voto vencido de 29.4.41 da 2 Cam. Crim. do TJSP, na Ap. n. 11956, de Santos, Apud RT 132/227 e ss (profits are arbitrary whenever they depend exclusively on one of the parties to the transaction). FRANCESCHINI, *supra* note 41, at 404-12.

- limiting the access of competitors to raw materials or equipment or to the channels of distribution;
- hoarding or impeding access by competitors to patents and technology;
- demanding exclusive advertising rights;
- coordinating bids in public auction;
- market allocations;
- suppressing competing technologies;
- refusals to deal not justified by normal commercial practice;
- tying the sale of a product to the purchase of another product;
- imposing resale prices or resale conditions on a distributor;
- destroying or hoarding a product to elevate its market price;
- artificially causing prices to oscillate;
- selling a product below cost without justification; and
- interrupting production or operations without justification.⁶⁰

These are strict liability provisions, since intent is not necessary to constitute the transgression. The law seeks to correct anticompetitive conduct, rather than punish wrongful intentions.

2. *Enforcement Mechanisms*

Law 8.884/94 establishes an administrative procedure to prevent and correct conduct that restricts competition. The Secretary for Economic Regulation (SDE)⁶¹ can investigate and make a preliminary determination of the existence of practices contrary to the antitrust laws. Either *ex officio*, or in response to a private party's complaint, the SDE can audit a company to investigate its compliance with the antitrust laws and require the company to correct its conduct. A company must either comply with the required corrections or be subject to daily fines.

Once it has initiated an investigation for anticompetitive practices, the SDE must notify the party within eight days. The party has two weeks to respond. The SDE has broad powers of investigation and discovery during the course of the proceedings. Upon gathering the relevant information, the SDE will either desist or order provisional corrective measures that the party must adopt, imposing daily fines as necessary. If the SDE makes a preliminary determination that there has been a violation, it will initiate proceedings with CADE for administrative adjudication.⁶²

The Administrative Council for Economic Defense (CADE), created in 1962, was revamped in the 1994 Antitrust Law. CADE is an administrative judicial board with competence to judge violations and impose sanctions for antitrust violations in Brazil. The decisions of CADE cannot be appealed through adminis-

60. Law 8.884/94, art. 20.

61. Secretaria de Direito Economico.

62. Law 8.884/94, art. 14.

trative channels, only directly to the courts.⁶³ If CADE declares that a violation has taken place and orders corrective measures, the guilty party has to comply within the time period indicated by CADE. If a party does not comply, CADE can impose fines and will initiate judicial proceedings to enjoin compliance.⁶⁴

Law 8.884/94 established a consultation mechanism whereby private parties could direct inquiries to CADE seeking an administrative opinion on a particular behavior.⁶⁵ This mechanism of private consultation was unfortunately abolished by Law 9.069/95.⁶⁶

The Consumer Protection Law of 1990 provides for individual and class actions to recover damages caused to consumers.⁶⁷ The 1994 Antitrust Law expressly provides that investigations and proceedings by the SDE and CADE do not preclude judicial recovery under the Consumer Protection Law.

Criminal offenses under Law 8.137/90 are punishable with fines or prison sentences. Prison sentences range from one to five years. Fines are set by the judge according to a complex formula contained in the law.⁶⁸ The prison sentences can usually be replaced with fines following an equivalence formula set forth in Law 8.137/90.⁶⁹

B. MERGERS, ACQUISITIONS, AND JOINT VENTURES

The formal requirements for mergers are set forth in the Corporation Law. A merger must be approved by the shareholders' assembly, after publication of a protocol indicating the terms under which the merger will take place.⁷⁰ Creditors can bring judicial action after the merger to request its annulment.⁷¹

Law 8.884/94 contains the new regulation of the antitrust aspects of mergers and acquisitions. The 1994 law provides that any act that may lead to market domination or that may limit competition is subject to a reporting requirement for approval by CADE. Asset acquisitions, mergers, and joint ventures must be reported for approval when they involve 20 percent or more of the relevant market, or when any of the companies involved have annual gross revenues of at least 100,000,000 UFIR (UFIR is a Brazilian unit of value based on a consumer index established by the Brazilian Treasury Ministry on a quarterly basis). A joint venture may be a violation of the antitrust laws if it is used as a means to

63. See *Natureza Juridica do CADE*, in FRANCESCHINI, *supra* note 41, at 531-37.

64. Law 8.884/94, arts. 46, 48.

65. *Id.* art. 59, § 1.

66. Law 9.069/95, art. 83.

67. Law 8.078, art. 82.

68. See Law 8.137/90, arts. 9, 10.

69. *Id.*

70. Corporation Law arts. 224, 227, § 1. For an English translation of the Brazilian Corporation Law, see COMMERCIAL LAWS OF THE WORLD: BRAZIL 114 (Foreign Tax L. Ass'n, rev. 1985).

71. *Id.* art. 232.

eliminate competition from the market.⁷² For purposes of analyzing antitrust implications, CADE has indicated that a joint venture is an association between enterprises, similar to an acquisition.⁷³ A formal agreement is not required for the existence of a joint venture; a joint venture can exist if there is a de facto association between enterprises.⁷⁴

CADE will authorize a merger, acquisition, or joint venture subject to the reporting requirement only if it can be shown that productivity and/or quality improvements result, the benefits are justly distributed among consumers and producers, and competition is not substantially reduced in a sector of the market.⁷⁵ The law does not provide guidance as to the means of determining productivity gains, just distribution, or substantial reduction of competition.

Under previous statutes, the "failing company defense" has been accepted by CADE and by the courts in cases of acquisitions, mergers, and joint ventures when the deal prevents the company from filing for protection from creditors.⁷⁶ CADE and the courts are likely to continue to apply their reasoning under the 1994 law.

C. DISTRIBUTOR AGREEMENTS AND RESALE PRICE MAINTENANCE

An exclusivity clause, whereby a distributor agrees not to sell the products of a different producer, is not a violation of the competition laws.⁷⁷ Such a clause would be a violation under the general provisions of the 1994 Antitrust Law only if it is used to dominate the market and eliminate competition.⁷⁸ Also, a company cannot impose on its distributors resale prices or any other conditions bearing on the relationship between the distributor and third parties if the prices have the purpose or the effect of restricting competition.⁷⁹

In proceedings before the SDE and CADE under the previous statutes, an exclusive distribution agreement was held to be a violation of the competition laws if it was used to extend the market power of the producer downstream.⁸⁰ Vertical integration was considered to be a violation of the law whenever it was

72. Law 8.884/94, art. 54, § 3, *amended by* Law 9.021/95, art. 78; Judgment of Sept. 26, 1980, Processo Admin. no. 29 (Arg.); Judgment of July 7, 1977, Processo de Averiguações Preliminares no. 67 (Arg.); FRANCESCHINI, *supra* note 41, at 66, 368.

73. See, e.g., FRANCESCHINI, *supra* note 41, at 76.

74. *Id.* at 331.

75. Law 8.884/94, art. 54.

76. Sentença de la instancia de 23 de abril de 1982, 6a Vara da Justiça Federal de São Paulo; Judgment of April 28, 1975, Processo de Averiguações Preliminares no. 50 (CADE). FRANCESCHINI, *supra* note 41, at 68, 76-77.

77. See e.g., Judgment of May 27, 1976, Processo Admin. no. 17 (Arg.); FRANCESCHINI, *supra* note 41, at 92.

78. Judgment of May 27, 1977, Processo Admin. no. 16 (Arg.); FRANCESCHINI, *supra* note 41, at 88.

79. Law 8.884/94, art. 20, § XI.

80. Judgment of July 29, 1975, Processo de Averiguações Preliminares no. 52 (Arg.); FRANCESCHINI, *supra* note 41, at 374.

used to dominate the sources of supplies, or the channels of distribution, by squeezing competitors out of the upstream or downstream markets.⁸¹ Other related decisions of CADE, under previous statutes, held that producers cannot discriminate among distributors by favoring a privileged group over others.⁸² Volume discounts, however, were held to be acceptable as long as they were reasonable and were made available to all distributors.⁸³ CADE also held, under previous statutes, that producers can bypass distributors and sell directly to the public or enter into competitive bids for distribution contracts with the government without violating the competition laws.⁸⁴ Producers, it was held, can promise not to sell directly to the public in competition with the distributors. Therefore, direct sales to the public can be a violation of contractual obligations, but they are not a violation of the competition laws. Since the current statute is more restrictive than the previous ones, decisions by CADE under the old statutes are probably a good indication of specific practices that will be considered to be anticompetitive under the current statute.

D. APPLICABLE LAWS

- (i) *Lei No. 9.069, Dispoe sobre o Plano Real, o Sistema Monetario Nacional, estabelece as Regras e condicoes de emissao do Real e os criterios para conversao das obrigacoes para o Real, e da outras providencias*, of June 29, 1995. Law 9.069/95 modifies Law 8.884. Law 9.069 establishes a 20 percent market share threshold for "abuses of economic power" and abolishes the mechanism of private consultation established by Law 8.884/94.
- (ii) *Lei No. 9.021, Dispoe sobre a implementacao da autarquia Conselho Administrativo de Defesa Economica—CADE, criada pela Lei n. 8.884, de 11 de junho de 1994, e da outras providencias*, of March 30, 1995. Law 9.021/95 modifies certain procedures to be followed by CADE established by Law 8.884/94.
- (iii) *Lei No. 8.884, Transforma o Conselho Administrativo de Defesa Economica—CADE em Autarquia, dispoe sobre a prevencao e a repressao as infracoes contra a ordem economica, e da outras providencias*, of June 11, 1994 (Law 8.884/94), as modified by Law 9.021 of March 30, 1995. Law 8.884/94 is the basic antitrust framework in Brazil.

81. Judgment of March 22, 1971, Processo no. 20.049 (Arg.); FRANCESCHINI, *supra* note 41, at 96-97.

82. Judgment of April 26, 1976, Processo Admin. no. 10 (Arg.); FRANCESCHINI, *supra* note 41, at 119-20.

83. *Id.*; Judgment of July 8, 1971, Processo Admin. no. 8 (Arg.); FRANCESCHINI, *supra* note 41, at 122-23.

84. Judgment of Nov. 3, 1976, Processo Admin. no. 18 (Arg.); FRANCESCHINI, *supra* note 41, at 117-18.

- (iv) *Lei No. 8.137, define crimes contra a ordem tributaria, economica e contra as relacoes de consumo, e da outras providencias*, of December 27, 1990 (Law 8.137/90), as reformed by Law 8.884/94. Law 8.137/90 establishes criminal penalties for certain anticompetitive practices.
- (v) *Lei No. 8.078, Dispoe sobre a protecao do consumidor, e da outras providencias*, of September 11, 1990 (Law 8.078/90). Law 8.078/90 prohibits certain forms of anticompetitive conduct.
- (vi) *Lei 7.347, Disciplina a acao civil publica de responsabilidade por danos causados ao meio ambiente, ao consumidor, a ordem economica, a bens e direitos de valor artistico, estetico, historico, turistico e paisagistico (vetado), e da outras providencias*, of July 24, 1985 (Law 7.347/85). Law 7.347/85 provides for class actions for damages to consumers.
- (vii) *Lei No. 6404*, of December 15, 1976, effective February 1977 (Corporation Law). The Corporation Law establishes formal requirements for mergers.

III. Competition Regulation in Chile

Chile has one of the most active systems of antitrust enforcement in Latin America. An important reason for the development of the antitrust law in Chile is the existence of a widespread commitment to the model of free market competition. Chilean companies seek to avoid being found guilty of anticompetitive practices, since such a finding would reflect a negative image.

The antitrust enforcement institutions in Chile are quite active and have effective authority over the enforcement of the antitrust laws. The enforcement structure includes a central commission, regional commissions, an appellate commission, and a National Economic Attorney's office. Not only do these institutions have broad investigative powers, but any private party can denounce violations of the antitrust laws. It is common practice, for example, for a company to direct an informal complaint to a competitor indicating that a violation is taking place. Often, this kind of informal communication is sufficient to prompt a competitor to cease a violation, since a complaint directed to the Commission could lead to an investigation of the company.

The antitrust framework, Decree 211 (as revised and compiled by Decree 511 of 1980), contains a list of prohibited practices, including unilateral and bilateral practices, horizontal and vertical restrictions, and a catch-all provision that declares illegal any conduct that restricts competition. This framework is very broad and offers little guidance to determine the scope of application of the antitrust laws. The Chilean antitrust regulation is characterized by fairly high levels of uncertainty, which can be particularly troublesome for business. Broad antitrust regulations that do not offer clear guidance to economic agents increase the risks, and therefore the costs, of doing business. On the other hand, a rigid and detailed antitrust framework could encroach on behavior that analyzed under the existing statute, would be considered procompetitive by the enforcement bodies.

An extensive body of decisions and the availability of a procedure of consultation whereby private parties can obtain an opinion from the government as to the legality of a particular course of action, as described below, reduce the uncertainty stemming from the broad antitrust statutes. In practice this procedure is a valuable resource. The opinions issued in response to consultations can be used for guidance by other companies, which can rely on these opinions instead of making a direct consultation.

The Chilean antitrust authorities are often well qualified in the field of economics. This fact is evidenced by certain decisions of the antitrust commissions dealing with technical issues of economic regulation. Nevertheless, the antitrust commissions have been criticized for lacking the necessary technical support to research their cases adequately.⁸⁵ Institutional competence helps to diminish, although does not completely eliminate, the risk of erratic enforcement of the broad Chilean antitrust laws.

A. REGULATION OF COMPETITION

1. *Enforcement Mechanism*

Four government institutions are responsible for the investigation, prevention, and correction of anticompetitive practices: the Regional Prevention Commissions; the Central Prevention Commission; the Resolving Commission; and the National Economic Attorney's Office (National Attorney). In 1995 the Prevention Commissions issued more than thirty-five decisions, and the Resolving Commission issued more than twenty-three, making Chilean antitrust enforcement one of the most active in Latin America.

The Regional Prevention Commissions perform the following functions: answer inquiries by private parties as to the validity of acts or agreements in light of the antitrust laws; request the National Attorney to investigate acts contrary to free competition; apply, at the request of the National Attorney, preventive measures to correct conduct that violates the antitrust laws, including suspension of agreements or production quotas for as long as fifteen days or establishing maximum sale prices for as long as fifteen days.⁸⁶ The Central Prevention Commission performs these functions for the city of Santiago and in cases involving the whole country or two or more regions.

85. See Susan Jackson, *Playing Monopoly*, BUS. LATIN AM., Jan. 22, 1996, at 3. This article takes a political angle in its analysis of Chilean antitrust enforcement, concluding that "the underlying problem is that there is no great interest in change according to one committee member . . . Also, the government is not disposed at present to pick a battle with corporate interests, which comprise much of the right wing opposition." The political argument should not be underestimated. However, as the Chilean economy opens to international competition (especially if Chile joins NAFTA), this argument becomes less persuasive.

86. Decree 211, § 8.

The orders issued by the Regional and Central Prevention Commissions can be appealed to the Resolving Commission.⁸⁷ Appeals must be brought within three working days. This short period of limitations necessitates swift action. The failure to appeal the decision within this time will result in the loss of all recourse.

Besides hearing appeals, the Resolving Commission has important investigative and enforcement functions. It can investigate ex officio, or at the request of the National Attorney, any violation of Decree 211. The Resolving Commission can impose sanctions for antitrust violations including: modifying or terminating agreements, or ordering a party to cease conduct that violates the antitrust laws; ordering the total or partial divestiture of a company; imposing fines for a sum of up to 10,000 Tax Units (the Tax Unit, or UT, is a standard unit of reference set monthly by the government for tax purposes in Chile); and requiring the National Attorney to initiate proceedings for criminal violations. The Resolving Commission can order provisional measures to stop the violations until it reaches a final decision.

The decisions of the Resolving Commission, by express provision of Decree 211, cannot be appealed to the courts.⁸⁸ Excepted are those decisions ordering the partial or total divestiture of a company, which can be appealed to the Supreme Court. This provision on nonappealability is of questionable constitutional validity since it withdraws a class of administrative decisions from all judicial control.

2. *Practices Regulated by the Competition Laws*

Any act or contract restricting competition in activities related to domestic or international trade is punishable by criminal and civil penalties.⁸⁹ Decree 211 includes a list of practices considered violations of the antitrust law when they restrict competition: (i) the assignment of quotas among producers; (ii) the assignment of quotas among distributors; (iii) the allocation of market zones; (iv) the granting of exclusive distribution rights to one distributor for the products of all competing producers; (v) entering into price-fixing arrangements; (vi) entering into agreements to prevent collective bargaining; and (vii) in general, all conduct that tends to restrict or eliminate free competition. These provisions are couched in very general terms.

The violations of the Antitrust Law have been defined with greater precision by the Prevention Commissions. Even though the decisions of these bodies are not legally binding, they carry considerable weight.

In practice, the Prevention and the Resolving Commissions are the main sources of antitrust regulation. Since the Commissions have wide investigative and en-

87. *Id.* § 9.

88. *Id.* § 19.

89. Res. 46, Resolving Commission (Sept. 27, 1978) (holding that an actual anticompetitive effect is not required by art. 1 of Decree 211).

forcement powers and the antitrust laws in Chile, as opposed to those of many other Latin American countries, are actively enforced, companies should abide closely by their decisions.

In most cases, the Commissions have ruled that price-fixing was a *per se* violation not requiring proof of market power or an anticompetitive impact on the market, or even the existence of an actual benefit to the violators.⁹⁰ In one decision, the Resolving Commission ordered the divestiture of a company that had been formed for the purpose of reselling, at a fixed price, the products of several competing manufacturers.⁹¹ The Resolving Commission considered it illegal for producers to suggest resale prices to the distributors or retailers of its products. This practice was considered to be a violation, even if it did not result in uniformity of prices in the market.⁹²

Tying the sale of a product to the purchase of other products is also illegal. The Resolving Commission, however, has permitted the sale of a product line as a bundle. This exception is important since it allows the aggregation of different goods to create a single product. Unclear are the criteria that would be used to aggregate a product line so that it could be sold as a single product under the antitrust laws.

Price discrimination is also prohibited. To determine price discrimination, the Resolving Commission tries to establish whether objective criteria justify the difference in prices and whether the criteria are consistently applied to all parties. To be considered objective, the criteria used by the company should relate to the characteristics of the sales transaction itself and should not depend on the identity or activities of the purchaser.⁹³ Some of the criteria that justify price differences are: discounts for volume; frequent purchases, which may justify giving special prices to the purchaser; and form of payment and other factors related to the sale.⁹⁴ Uniform prices must be available to all wholesale or retail buyers purchasing under the same conditions. These conditions must be impartial and objective and must be made known to all interested parties.⁹⁵ Discrimination can exist when goods must be purchased along with other related goods (that is, as a bundle of goods) if the requirement of uniform prices is not applied across the board. However, since 1990 the Prevention Commission has begun to analyze price discrimination cases on the basis of whether differences in costs justify

90. Res. 67, Resolving Commission (Oct. 31, 1979) (holding that a violator of the price-fixing prohibition does not require the existence of anticompetitive impact).

91. *Id.*, cited in JORGE CAREY, CHILE § 4.02 (1986).

92. Res. 56, Resolving Commission (Jan. 17, 1979) (holding that suggesting resale prices is prohibited by Decree 211, even if it does not, in fact, result in uniform prices).

93. Res. 68, Resolving Commission (Oct. 31, 1979) (holding that an objective criterion should relate to the sales transaction itself and should not depend on the activity of the purchaser).

94. C.P.C. 291/689, 1981; C.P.C. 143/21, 1977; C.P.C. 155/286, 1977.

95. Res. 29, Resolving Commission (1977) (ordering a company to cease discrimination in prices and other conditions that are not justified by objective criteria).

differences in prices.⁹⁶ This reflects a trend towards the application of economic analysis by the enforcement bodies.

Unjustified refusals to sell are prohibited by the Consumer Protection Law. If the product is normally available and a company refuses to sell to a particular customer, a violation of the law may occur. If the refusal is not justified by objective criteria, the company may be prosecuted for violating the Consumer Protection Law. The appointment of an exclusive purchaser of the complete product line of an industry is a violation of the competition laws. If a producer sells to a retailer, it must also sell to all other interested retailers under the same conditions.⁹⁷

Employment contracts prohibiting employees from working for a competitor after termination are also a violation of the antitrust laws.⁹⁸ It is not clear if this is a blanket prohibition, or if it would allow certain exceptions such as to protect trade secrets.

B. MERGERS

Mergers violate the antitrust laws if they affect a high percentage of the total product offered on the market.⁹⁹ The Resolving Commission has accepted a form of the failing company defense, and has allowed mergers involving a company that would otherwise have filed for bankruptcy. This result illustrates the role of the Commissions in creating important guidelines for the interpretation of the antitrust laws.

A merger is usually achieved by creating a new company that assumes all the rights and obligations of the merging companies. The procedure for mergers in Chile is simple and is contained in a few articles of the Corporation Law.¹⁰⁰

C. DISTRIBUTORSHIP AGREEMENTS AND RESALE PRICE MAINTENANCE

The Resolving Commission has penalized agreements under which a distributor is required to distribute exclusively the products of one manufacturer.¹⁰¹ In practice, this provision is not as restrictive since it is possible to structure a relationship, through cost-sharing agreements for example, that will not violate the law. These agreements must be on a case-by-case basis, using prior permitted exceptions, since no general formula exists to set up these arrangements.

96. C.P.C. 238/006, 1979. This situation is different from tying, which is illegal per se. Here, the aggregation of products is legitimate, e.g., a line of product, but is applied in a discriminatory manner. For an important analysis of the recent trends in Chilean antitrust enforcement, see Ricardo Paredes M., *Jurisprudencia de las Comisiones Antimonopolios en Chile*, 58 ESTUDIOS PÚBLICOS (Santiago de Chile, 1995).

97. Res. 19 (1975).

98. C.P.C. 335/538, 1982.

99. C.P.C. 282/536; CAREY, *supra* note 91.

100. Corporation Law arts. 99-100; see COMMERCIAL LAWS OF THE WORLD: CHILE 29 (Foreign Tax L. Ass'n, rev. 1990).

101. R.C. 90, 1981; CAREY, *supra* note 91, § 4.02[4].

The Central Prevention Commission has found that resale price maintenance infringes the antitrust laws.¹⁰² The decision generated some controversy within the Commission, but it has become well-ingrained in legal and commercial practice in Chile. Today manufacturers publish a list of prices at which they will sell to distributors, but they will not suggest a resale price. Only if the distributors operate as its agents can the producer indicate a resale price to them. If the distributor is independent, that is, if it assumes the costs and risks of doing business, resale price maintenance is illegal per se.¹⁰³ Furthermore, to avoid price discrimination, producers should offer uniform prices to all distributors.¹⁰⁴ Offering special discounts to some distributors and not to others is a violation of Decree 211.¹⁰⁵

An agreement among competitors to assign an exclusive distributor for a product was found by the Commission to be a violation of the competition laws.¹⁰⁶

D. APPLICABLE LAWS

- (i) *Decreto Ley 211*, of December 22, 1973, as revised and compiled by *Decreto 511*, in *Diario Oficial*, of October 27, 1980 (Decree 211). Decree 211 is the basic antitrust framework in Chile and incorporates all previous law on the subject. *Decreto 511* contains the final systematized text of Decree 211.
- (ii) *Ley 18.223*, in *Diario Oficial* of June 11, 1983 (Consumer Protection Law). The Consumer Protection Law regulates, among other things, certain forms of refusal to deal.
- (iii) *Ley No. 18.046*, in *Diario Oficial* of October 22, 1981 (Corporation Law). The Corporation Law establishes the formal requirements for a merger.

IV. Competition Regulation in Colombia

The enforcement of antitrust laws in Colombia is virtually nonexistent. Several explanations can account for this void in the application of the law. One is that Colombia has no monopolies. This explanation is very popular, and it is forcefully promoted by the press.¹⁰⁷ It is disingenuous, however, to assert that monopolistic

102. C.P.C. 125/185, 1976; C.P.C. 134/250, 1976; CAREY, *supra* note 91, § 1[3].

103. Res. 48, Resolving Commission (Sept. 27, 1978) (holding that an independent merchant should not be restricted as to which products it can sell or at what prices).

104. C.P.C. 280/988, 1981; CAREY, *supra* note 91, § 4.01[2].

105. Res. 35 (1977). A Chilean company was fined for offering discounts to distributors of liquid fuels that were not offered to other retailers not distributing such fuels. The company's action was determined to be a violation of Decree 211, "regardless of the relationship of the favored distributors with the [company], of their financial capacity, and of the volume of business they conduct."

106. C.P.C. 232/249, 1979.

107. *Cf., e.g., El Mito de los Monopolios en Colombia*, REVISTA CROMOS, Aug. 16, 1993, at 34: "An ideology related to Marxism, that disregards the contributions of enterprises that have been working for the progress of the country for over a hundred years, has been accusing these enterprises of pernicious monopolistic practices. A level-headed study [of the subject] . . . shows that in Colombia monopolies do not, and cannot, exist." (Translation by the author.) Even though this article plausibly argues that antitrust is unnecessary in an open economy, the article is written in vehement terms

practices are nonexistent in Colombia. Another explanation is that antitrust is a largely ignored and misunderstood field that has its origins in the common law countries and is somewhat alien to the civil law tradition. The origins of antitrust law may be one reason why Colombian law schools rarely teach antitrust law and why few, if any, members of the bureaucracy are trained in antitrust enforcement. Consequently, the economic analysis necessary for many instances of antitrust enforcement is beyond the level of expertise of government institutions. Finally, the most important factor is the absence of the necessary political will to pursue enforcement of antitrust laws.

Whatever the reasons for lack of enforcement, the Colombian antitrust laws have not been an obstacle to those who engage in anticompetitive practices. As the open economy policies adopted by the last two governments take effect, competition from international products may make these laws increasingly unnecessary. Thus, the entire issue of enforcement may become moot.

A. REGULATION OF COMPETITION

1. *Practices Regulated by the Competition Laws*¹⁰⁸

According to the 1991 Colombian Constitution, monopolies can be established only by law and in pursuit of the public interest.¹⁰⁹ The 1991 Colombian Constitution authorizes the state to adopt and enforce laws to prevent abuses of market power and to protect the free market.¹¹⁰

The Antimonopoly Law prohibits conduct directed at the monopolization of distribution in a market.¹¹¹ The Antimonopoly Regulation prohibits abuses of market power,¹¹² including: pricing below cost in order to eliminate competition or to prevent entry; discriminating among suppliers or consumers in a way that either places them at a disadvantage relative to the competition, or eliminates or reduces competition in the market; tying unrelated conditions or obligations to the supply of a product; selling in different parts of the country at different prices, when the difference does not correspond to a difference in costs, and the intention or effect is to reduce competition.¹¹³ These violations presuppose the existence of market power, and therefore, are analyzed under a rule-of-reason

that are worthy of attention, especially since the magazine in question is owned by one of the largest and most concentrated business conglomerates in Colombia. Cf. Jose de Cordoba, *Colombian Paradox: Embattled President Has Powerful Friend*, WALL ST. J., Feb. 6, 1996, at A1.

108. The competition laws include the Antimonopoly Law and its related provisions.

109. CONSTITUCIÓN POLÍTICA DE COLOMBIA [COLOMBIAN CONSTITUTION] art. 336.

110. *Id.* art. 333.

111. Ley 155 Sobre Prácticas Comerciales Restrictivas [Antimonopoly Law] art. 8 (Dec. 24, 1959). This provision has been interpreted as a prohibition of agreements aimed at controlling 50% or more of the market. Investing, Licensing & Trading Conditions Abroad: Colombia (Economist Intelligence Unit) § 5.1 (1996). This reading is not supported by the text of the law and its source is not indicated.

112. Article 50 regulates unilateral conduct.

113. Decree 2153/92, art. 50.

standard requiring an inquiry into the market structure and the effect of the practice.

The Antimonopoly Law prohibits agreements or concerted action to fix the price or quantity of the supply of goods or services.¹¹⁴ In 1992 the government issued Decree 2153, which included new provisions that prohibit agreements or concerted action to allocate markets, sources of supplies, or quotas of production or distribution.¹¹⁵ These provisions seem to establish a per se violation whenever one of these agreements is reached.

The Antimonopoly Law protects independent distributors from disloyal competition by the producer, its affiliates, or its subsidiaries that sell the same products directly to the market.¹¹⁶ It provides that acts of disloyal competition constitute a transgression of the Antimonopoly Law.¹¹⁷ Acts of disloyal competition were recently defined as "acts . . . contrary to fair commercial practice, commercial good faith . . . [or which have an adverse impact] on the [free] operation of competition in the markets."¹¹⁸ Acts of disloyal competition include those that: mislead customers as to the identity of a company or the quality or origin of a product; damage a competitor through industrial espionage, false statements, or disturbing the operations of its enterprise; and produce chaos in the market.¹¹⁹ The notions of disloyal competition and commercial good faith are broad notions, lacking a precise meaning, used by the legislature as a backdrop for the interpretation of the prohibitions enacted in the law.

Decree 2153/92 prohibits agreements or concerted action that discriminate against third parties in the price or conditions of a sales transaction.¹²⁰ Decree 2153/92 prohibits tying to a contract additional obligations not related to its nature. These conducts are per se violations of the law.

Boards of directors overlapping among firms producing the same goods or services are prohibited. This prohibition applies also to administrators and managers.¹²¹ The Antimonopoly Law prohibits members of the board of directors, managers, presidents, and legal representatives from selling products of the company privately, either directly or through an intermediary.¹²² Additionally, these people are barred from owning other companies that produce or sell the same goods or services.¹²³ The latter prohibition also extends to immediate family

114. Antimonopoly Law art. 1, amended by the 1963 Amendment to the Antimonopoly Law; Decree 2153/92, art. 45.

115. Decree 2153/92, art. 47. For a discussion on the constitutionality of this Decree, see Enrique Gaviria Gutiérrez, *Nuevas Disposiciones Sobre Prácticas Comerciales Restrictivas*, in *NUEVAS ORIENTACIONES DEL DERECHO COMERCIAL* (1993).

116. Antimonopoly Law art. 7.

117. *Id.* art. 8.

118. Ley 256 de 1996 por la cual se dictum normas sobre competencia desleal [Law 256 of 1996].

119. *Id.* art. 11.

120. Decree 2153/92, art. 47.

121. Antimonopoly Law art. 5.

122. *Id.* art. 6.

123. *Id.*

members.¹²⁴ The Antimonopoly Regulation establishes an annual reporting requirement for companies subject to administrative supervision. The annual report must list all directors, officers, and administrative personnel to facilitate compliance with the above-mentioned restrictions.¹²⁵

Decree 2153/92 prohibits agreements or concerted action to suppress technological developments or to stop or reduce the supply of products or services.¹²⁶ Hoarding a product of "popular consumption" is a criminal violation.¹²⁷

It is a violation of the Antimonopoly Law to engage in advertising that violates the Consumer Protection Law, to induce or force a company to increase its prices, and to refuse to deal with a company in retaliation for its price policies.¹²⁸

Application of the antimonopoly rules is subject to three exceptions. Exempt are: cooperative scientific or technological projects; agreements to comply with nonmandatory industry standards, norms, and measures; and agreements related to the use of common facilities.¹²⁹

2. *Enforcement Procedures*

The Superintendency, the body charged with enforcing the antitrust laws, may upon a private complaint, or ex officio, investigate any violation of the competition laws.¹³⁰ The complaints brought to the Superintendency are evaluated by the Competition Division¹³¹ and, if they are substantial, an investigation may be initiated.¹³²

The investigation is conducted in a confidential manner. The Superintendency has broad powers to solicit information from the companies or persons under investigation.¹³³ As a preliminary measure, the Superintendency may order the company to suspend the conduct in question.¹³⁴

Once the investigation is concluded, the party has up to thirty days to respond to any charges.¹³⁵ If a violation of the competition laws has taken place, the Superintendency¹³⁶ may order the company to modify or cease the illegal con-

124. *Id.*

125. Antimonopoly Regulation art. 14, amended by Decree 2153/92, art. 2, § 1 (assigning the function of supervising compliance with the competition laws to the Superintendency of Industry and Commerce).

126. Decree 2153/92, art. 47.

127. CÓDIGO PENAL [CRIMINAL CODE] art. 229. The law includes, among the list of "products of popular consumption" several oil and coal derivatives of widespread use.

128. Decree 2153/92, art. 48.

129. *Id.* art. 49.

130. Antimonopoly Law art. 12, amended by art. 2 of the 1961 Amendment to the Antimonopoly Law, amended by arts. 2, 4, & 53 of Decree 2153/92.

131. División de Promoción de la Competencia.

132. Decree 2153/92, art. 12.

133. Antimonopoly Law art. 13.

134. Decree 2153/92, art. 4.

135. Antimonopoly Law art. 13.

136. The superintendent will determine the sanctions after consulting with the Advisory Committee of the Superintendency. Decree 2153/92, art. 24.

duct¹³⁷ and may subject the company to administrative supervision for the amount of time it deems necessary.¹³⁸

The Antimonopoly Regulation establishes semiannual reporting requirements for companies subject to administrative supervision. These requirements include submitting information about balances, market structure, cost structure, taxes, marketing systems, and personnel.¹³⁹ This administrative supervision regime may also be applied to companies that have the capacity to determine market prices.¹⁴⁰

The Superintendency may impose other sanctions for the transgression of the competition laws, including: retiring the company from the list of publicly traded companies;¹⁴¹ fining the company for a maximum amount of 2000 minimum legal daily salaries;¹⁴² and fining the administrators, directors, managers, and auditors for a maximum amount of 300 minimum legal daily salaries.¹⁴³

By express legal provision, contracts entered in violation of the Antimonopoly Law are unenforceable, and companies that are repeat offenders of the competition laws may be dissolved by order of the Superintendency.¹⁴⁴

Pursuant to a recently adopted law regulating unfair commercial practices, parties affected by acts of "disloyal competition" may (i) seek an injunction to prevent damages arising out of disloyal conduct by other economic actors, and (ii) may request reparation for damages incurred as a result of such conduct.¹⁴⁵

B. RESALE PRICE MAINTENANCE

The Antimonopoly Law explicitly authorizes resale price maintenance. When a company sets the price of a good or service for sale to the public, it is an act of disloyal competition for the company, its affiliates, its distributors, or independent sellers to sell the product at a different price.¹⁴⁶ This rule protects, and seems to encourage, resale price maintenance.

C. MERGERS AND ACQUISITIONS

1. *Procedure for Mergers*

The Commercial Code establishes the legal procedure for a merger.¹⁴⁷ The merger must be approved by the Board of Shareholders or the Assembly and

137. Decree 2153/92, art. 4.

138. Antimonopoly Law art. 17.

139. Antimonopoly Regulation art. 2.

140. Antimonopoly Law art. 2.

141. *Id.* art. 14, amended by art. 2 of the 1962 amendment to the Antimonopoly Law, amended by Decree 2153/92, arts. 2, 4, & 53.

142. Decree 2153/92, art. 4.

143. *Id.*

144. *Id.* art. 46; Antimonopoly Law art. 19.

145. Law 256 of 1996, art. 20.

146. Antimonopoly Law art. 9.

147. Acquisitions are governed by the general provisions of the contract of sale applied to corporations.

must follow the procedures established in the corporate charter for mergers or for an early dissolution. The agreement must be published in a national newspaper and can be challenged by creditors within thirty days. Creditors may initiate proceedings in court to obtain adequate security for their credit. Once the thirty-day period elapses, or once the proceedings are completed, the merger can be executed.¹⁴⁸

2. *Application of the Competition Laws to Mergers and Acquisitions*

Mergers and acquisitions of companies producing or distributing the same product¹⁴⁹ must be reported to the Competition Division of the Superintendency for approval.¹⁵⁰ The report must include, among other documents, a certificate from the Superintendency stating that the applicants have not been sanctioned for violations of the competition laws; a description of the mode of operation and distribution; a description of the market; and a copy of the balance sheets, the corporate articles, and the merger resolution.¹⁵¹

The Superintendent may object to the merger or acquisition within thirty days, if the deal restricts competition. If no objection is made within thirty days, the parties may proceed with the merger or acquisition.¹⁵² The Antimonopoly Regulation establishes presumptively that a merger or acquisition will unduly restrict competition when it is preceded by price-fixing or market-allocation arrangements or when the conditions in the market are such that the merger or acquisition is likely to result in an increase in prices.¹⁵³ The Superintendency will not object to a merger or acquisition if the parties can demonstrate the likelihood of significant gains in efficiency that cannot be achieved, or by other means guarantee no decrease in supply.¹⁵⁴

A merger or acquisition authorization can be suspended or revoked at any time if the company is found guilty of a violation of the competition laws.¹⁵⁵ However, no merger, acquisition, or joint venture appears to have been prevented or modified on antitrust grounds.

148. For an English translation of the relevant provisions of the Commercial Code on mergers, see COMMERCIAL LAWS OF THE WORLD: COLOMBIA arts. 172-80, 42 (Foreign Tax L. Ass'n, rev. 1983).

149. The article's wording refers to companies producing the same goods. It is not clear whether this provision would be applied literally. If applied literally, it would not appear to cover mergers or acquisitions of companies producing close, or perfect, substitutes.

150. Antimonopoly Law art. 4; Decree 2153/92, art. 12.

151. Antimonopoly Regulation art. 10.

152. Antimonopoly Law art. 4, *amended by* art. 2 of the 1963 Amendment to the Antimonopoly Law, *amended by* Decree 2153/92, arts. 2, 4, & 53; Decree 2153/92, art. 4.

153. Antimonopoly Regulation art. 6.

154. Decree 2153/92, art. 51.

155. Antimonopoly Regulation art. 12.

D. FINANCIAL SECTOR REGULATIONS

The Financial Regulation of 1993,¹⁵⁶ the regulatory framework for the insurance and financial sectors in Colombia, includes provisions that seek to prevent anticompetitive practices in the financial sector and in the insurance industry. It prohibits any concerted conduct seeking to restrict, impede, or distort competition in the financial sector or in the insurance industry.¹⁵⁷ The Superintendency of Banks¹⁵⁸ may issue an order directing those guilty of practices contrary to the provisions of the Regulation to cease such practices and may impose sanctions.¹⁵⁹ The Financial Regulation of 1991 allows injured parties to bring class actions seeking damages for prohibited anticompetitive practices.¹⁶⁰ This provision is innovative and is not present in the antitrust regulations of the other countries reviewed in this article.

E. ANDEAN PACT REGULATIONS

In 1991 the Commission of the Cartagena Agreement,¹⁶¹ the governing body of the Andean Pact,¹⁶² issued a resolution establishing the Andean Pact competition rules.¹⁶³ These rules apply to enterprises that conduct economic activities in several countries in the Andean Pact or enterprises based in one of the member countries whose anticompetitive activities have an impact on other member countries.¹⁶⁴ The member countries or enterprises affected may bring a request before the Board of the Andean Pact (Board),¹⁶⁵ the technical body in charge of securing compliance with the tenets of the Pact, seeking measures to correct an anticompetitive practice.

The conduct regulated by the competition rules of the Andean Pact falls within two broad categories: (i) bilateral practices, including agreements and other concerted practices to fix prices, set maximum volumes of production, allocate markets, and tie in the sale of products with the sale of other products not normally sold as a bundle;¹⁶⁶ and (ii) abuse of a dominant position in the market, including

156. Estatuto Orgánico del Sector Financiero, Decreto Número 663 de 1993 (Apr. 2, 1993).

157. Financial Regulation of 1993, art. 98. Only bilateral conduct is prohibited in this Regulation.

158. Superintendencia Bancaria.

159. Financial Regulation of 1993, art. 98.

160. *Id.* § 3.

161. Comisión del Acuerdo de Cartagena.

162. The Andean Pact was formed in 1969 in an effort to create an intraregional common market. The original members were Bolivia, Colombia, Chile, Ecuador, and Peru. In 1973 Venezuela joined the Andean Pact, and in 1976 Chile withdrew its membership. The current members are: Bolivia, Colombia, Ecuador, Peru, and Venezuela. The Andean Pact has had questionable success, since its policies have often been neglected by member countries. However, in the last four years the Andean Pact has been revitalized, especially because intraregional trade has been steadily increasing.

163. Comisión del Acuerdo de Cartagena, Decisión 285 de 1991 [hereinafter Decision 285/91].

164. *Id.* art. 2.

165. Junta del Acuerdo de Cartagena.

166. Decision 285/91, art. 4.

setting prices at a level that does not correspond to those that would prevail in normal commercial transactions,¹⁶⁷ limiting the quantity of a product in the market, refusals to deal, and the use of tie-in arrangements.¹⁶⁸

To determine the existence of an anticompetitive practice, the Board will consider the following factors: the impact of the practice on the quantity of the product in the relevant market; the practice's impact on price; and other relevant considerations in general.¹⁶⁹ If the Board finds practices to be anticompetitive, it may issue a decision prohibiting the conduct in question and may order the necessary measures to eliminate the anticompetitive practices. The member countries should take the necessary measures to comply with the order.¹⁷⁰ The countries affected by the anticompetitive practices are expressly authorized to levy a specific protective tariff for the products that are the object of the anticompetitive conduct.¹⁷¹ This supranational body of antitrust legislation, like other antitrust statutes in the countries of the region, has not been enforced.

F. APPLICABLE LAWS

- (i) *Ley 155 Sobre Prácticas Comerciales Restrictivas*, of December 24, 1959 (Antimonopoly Law). The Antimonopoly Law protects competition in the market and is the basic antitrust law in Colombia.
- (ii) *Decreto 3307*, of December 30, 1963 (1963 Amendment to the Antimonopoly Law).
- (iii) *Decreto 1302 de 1964, por el cual se reglamenta la ley 155 de 1959*, of June 1, 1964 (Antimonopoly Regulation). The Antimonopoly Regulation develops the provisions of the Antimonopoly Law.
- (iv) *Código de Comercio de Colombia*, articles 172-180 (Commercial Code). The Commercial Code includes provisions on mergers and unfair competition.
- (v) *Constitución Política de Colombia* (1991 Colombian Constitution). According to the 1991 Colombian Constitution, monopolies can be established only by law.
- (vi) *Decreto 2153 de 1992, por el cual se Reestructura la Superintendencia de Industria y Comercio*, of December 30, 1992 (Decree 2153/92). Decree 2153/92 establishes mechanisms for the enforcement of the Antimonopoly Law.

167. This criterion is not very clear. It is not clear how a normal commercial transaction test would be applied to determine if there is an abuse in pricing. The price that is set by normal commercial practices in the region may be a monopolist's price. An objective criterion, such as the international price of the product, would be easier to apply.

168. Decision 285/91, art. 5.

169. *Id.* art. 13.

170. *Id.* art. 16. The specific mechanism to obtain enforcement is not set in place by the law. This fact obviously weakens the effectiveness of this regulation.

171. *Id.*

- (vii) *Código Penal* (Criminal Code). The Criminal Code establishes criminal penalties for hoarding products of popular consumption.
- (viii) *Estatuto Orgánico del Sector Financiero, Decreto Número 663 de 1993*, of April 2, 1993 (Financial Regulation of 1993). The Financial Regulation of 1993 is the framework regulation for the Financial and Insurance sectors. It prohibits certain anticompetitive practices in these sectors.
- (ix) *Decisión 285 de 1991 de la Comisión del Acuerdo de Cartagena* (Andean Pact Decision 285). Andean Pact Decision 285 regulates anticompetitive practices within countries of the Andean Pact.
- (x) *Ley 256 de 1996 por la cual se dictum normas sobre competencia desleal*, (Law 256 of 1996). Regulates disloyal competition and repeals article 10 of the Antitrust Law and articles 75-77 of the Commercial Code.

V. Competition Regulation in Mexico

The 1992 Mexican competition law was received as a well drafted and economically sound regulation. Antitrust enforcement in Mexico has never been very forceful, but the technocratic orientation of the last two governments, the free market policies they have promoted, and the 1992 enactment of the new antitrust statute are the main reasons why antitrust enforcement has become more prevalent. Whereas before the enactment of the 1992 competition law antitrust enforcement was almost unheard of in Mexico, the statistics reported in the 1994 Annual Report of the Federal Competition Commission (the Commission), the body in charge of antitrust enforcement in Mexico, show that antitrust enforcement is on the rise in Mexico.

In 1993-94 the Commission performed sixteen ex officio investigations of practices of economic agents in several sectors of the economy, including credit cards, gasoline distribution, and the brokerage of government securities. The commission found violations in six of these ex officio investigations.¹⁷² During that same period, private parties brought twenty-two complaints before the Commission, sixteen of which were dismissed as lacking merit.¹⁷³ The participants in four mergers were sanctioned for failing to notify the Commission of their operation as required by the 1992 antitrust law.¹⁷⁴

Traditionally, the state and the private sector in Mexico have been interdependent. Businesses would often obtain special concessions from the government to perform a particular economic activity. Inasmuch as business may still depend on certain concessions from the government, whether explicit or implicit, independent antitrust enforcement may be an important complement to free-trade policies in order to help facilitate a competitive economy.

172. FEDERAL COMPETITION COMMISSION, 1993-1994 ANNUAL REPORT 31.

173. *Id.* at 47.

174. *Id.*

A. REGULATION OF COMPETITION

1. *Practices Regulated by the Competition Laws*

The Mexican Constitution proscribes monopolies and any form of arrangement to increase prices or reduce the supply of a product in the market.¹⁷⁵ Article 28 establishes that government monopolies, labor unions, and patent and copyright holders are not included as monopolies.¹⁷⁶

The Competition Law is a regulation issued pursuant to Article 28 of the Mexican Constitution. It is a comprehensive antitrust framework regulating conduct that restricts the efficient operation of the free market.¹⁷⁷ The conduct covered by the Competition Law falls within three broad categories: "absolute monopolistic activities," which consist of certain types of agreements or concerted action among competitors; "relative monopolistic practices," which do not necessarily involve collusion among competitors and are a violation only if the agent has market power, and the conduct restricts or is intended to restrict competition; and mergers and acquisitions that restrict competition.

The Competition Law¹⁷⁸ prohibits "absolute monopolistic practices," which include all agreements or collusive action among competitors to: fix prices or exchange price information to facilitate price fixing; restrict the supply of a product or service; allocate markets or portions of markets, clients, or suppliers; or place coordinated bids in competitive bidding contests. These are per se violations of the Competition Law.¹⁷⁹

The Competition Law¹⁸⁰ also prohibits "relative monopolistic practices," which include all "acts, contracts, agreements, and combinations whose purpose or effect is to displace other agents in the market, prevent their access, or give one of them special advantages" through one of the following: (i) establishing exclusive distribution of goods or services; (ii) establishing the resale prices or sales conditions that must be observed by a distributor or provider (resale price maintenance); (iii) tying the purchase or sale of a product to the purchase or sale of another product normally distinguishable, or establishing reciprocity conditions; (iv) agreeing not to deal with other purchasers or sellers; (v) refusing to deal with a third party when it is normal practice to deal with third parties in the type of transaction involved; (vi) seeking, through a group effort, to compel a client or supplier to undertake a particular course of action; or (vii) engaging in any other conduct that restricts competition.

175. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 28.

176. *Id.*

177. Ley Federal de Competencia Económica [Competition Law] art. 2 (Dec. 18, 1992).

178. *Id.* art. 9.

179. See, e.g., Jeffrey Zuckerman, *Competition, Competing Approaches in Latin America*, INT'L CORP. L., Apr. 1993. For an in-depth study of the Mexican antitrust laws, see INGRID GIULIANA ROSSI, LA LEGISLACIÓN DE LA COMPETENCIA EN MÉXICO.

180. Competition Law art. 10.

Relative monopolistic practices are not per se violations of the Competition Law. In order for these practices to constitute a violation, market power must exist in the relevant market. In order to determine the existence of market power, article 13 of the Competition Law¹⁸¹ establishes a number of factors that should be considered: (i) the capacity of the company to determine prices or reduce the supply of a product in the market whenever there are no actual or potential means by which competitors can counteract such power; (ii) barriers to entry; (iii) the existence and market power of competitors; (iv) the access of the company and its competitors to sources of supplies; (v) the recent conduct of the company; and (vi) other criteria as may be adopted by the regulations to the Competition Law. In defining the relevant market the Competition Law¹⁸² considers the existence and availability of adequate substitutes in the market and the possibility of access to other markets, domestic or international, to obtain the goods or services in question, taking into consideration the cost, time, and legal restrictions.

In order to determine when a merger, acquisition, or other concentration among economic agents violates the Competition Law, the Commission¹⁸³ will consider the relevant market,¹⁸⁴ the degree of concentration and market power of the agent and its competitors using the same criteria as set forth in article 13,¹⁸⁵ and other criteria that may be adopted by future regulations to the Competition Law.¹⁸⁶

2. *Enforcement Procedures*

The Commission can investigate anticompetitive practices, relative or absolute, that violate the Competition Law.¹⁸⁷ The investigation can be initiated ex officio or upon a private party complaint.¹⁸⁸ A private party will have standing to bring a complaint to the Commission in all cases of "absolute monopolistic activities." In cases of "relative monopolistic activities" or concentrations (mergers and the like), a private party must show that it has been harmed by the practice.¹⁸⁹

Finally, the Competition Law gives a cause of action for damages to private parties. Injured parties may bring a tort action in court to recover for damages resulting from violations of the Competition Law.

3. *Sanctions*

The Commission can impose sanctions that include: (i) ordering the transgressors to cease or modify their conduct; (ii) ordering the partial or total divestiture

181. *Id.* art. 13.

182. *Id.* art. 12.

183. Comisión Federal de la Competencia.

184. *See supra* note 182 and accompanying text.

185. Competition Law art. 13.

186. *Id.* art. 18.

187. *Id.* art. 24.

188. *Id.* art. 30.

189. *Id.* art. 32.

of the concentration; (iii) fines on the company of up to 7,500 minimum daily salaries¹⁹⁰ for giving false information to the Commission, up to 375,000 minimum daily salaries for entering into an "absolute monopolistic activity," up to 225,000 minimum daily salaries for entering into a "relative monopolistic activity," up to 225,000 minimum daily salaries for entering into an unlawful concentration, up to 100,000 minimum salaries for failing to notify the Commission of a concentration when it was required by the Competition Law to do so, and up to 100,000 minimum salaries for other practices that harm competition; and (iv) fines of up to 7,500 minimum salaries on the individuals that take part in one of these transgressions. These fines may be doubled in the case of repeat offenses. The Commission may impose a fine equivalent to 10 percent of the annual sales or 10 percent of the assets of a company, whichever is higher, when the violation is particularly serious.¹⁹¹

Once the Commission determines that an economic agent has transgressed the Competition Law, private parties that have been injured may bring suit before the courts to recover damages.¹⁹²

Moreover, agreements entered into in transgression of the Competition Law's provisions against absolute monopolistic practices are null and void.¹⁹³

B. MERGERS

The General Law of Mercantile Companies establishes the requirements for mergers in Mexico. First, the merger resolution must be adopted pursuant to the company's articles of incorporation and must meet the legal requirements established for the specific kind of corporation or partnership.¹⁹⁴ Also, the merger resolution must be published in the *Public Register* and in the *Official Gazette* and must be accompanied by a balance sheet of the merging companies and a statement as to the procedure that will be followed to extinguish the liabilities.¹⁹⁵ Creditors may

190. The minimum daily salary is set periodically by the National Commission of Minimum Salaries, a government body that includes representatives from the government, the private sector, and the workers' unions. As of April 25, 1996, the minimum daily salary was set at an equivalent of US \$3.05.

191. Competition Law art. 37.

192. *Id.* art. 38.

193. *Id.* art. 9.

194. Ley General de Sociedades Mercantiles [General Law of Mercantile Companies] art. 222 (Aug. 4, 1934). "The merger of companies must be decided by each of them in the manner and terms according to their nature."

195. General Law of Mercantile Companies art. 223. "Resolutions to merge shall be recorded in the Public Register of Commerce and published in the Official Gazette. . . . Each company must publish its last balance sheet and . . . the procedure adopted for extinguishing their liabilities." *Translated in COMMERCIAL LAWS OF THE WORLD: MEXICO* (Book 1) 333 (Foreign Tax L. Ass'n, rev. 1996).

oppose the merger in court within three months of publication.¹⁹⁶ At the end of this period, if the creditors have not opposed it, the merger can proceed.

The Commission must be notified of mergers or other combinations of enterprises when the companies surpass certain monetary thresholds. The Competition Law requires that the Commission be notified of the following concentrations before they take place: (i) when the transaction involves a sum larger than the equivalent of twelve million times the minimum legal salary in the Federal District; (ii) if the transaction results in the accumulation of more than 35 percent of the assets of a company with assets or sales greater than twelve million times the minimum legal salary in the Federal District; or (iii) when the transaction involves two or more companies with joint assets or sales of more than forty-eight million times the minimum legal salary in the Federal District and will generate an additional concentration of assets or capital superior to 4.8 million times the minimum legal salary in the Federal District.¹⁹⁷

The notification must be in writing with a full description of the parties involved, the transaction, market share, and recent financial statements.¹⁹⁸ The Commission has twenty days to request additional information and forty-five days to issue a determination. In exceptionally difficult cases, the Commission will have sixty-five additional days to issue a determination.¹⁹⁹ A favorable resolution by the Commission will not exonerate the parties from liability for other violations, but the concentration itself cannot be challenged under the Competition Law.²⁰⁰

If no response is issued after the forty-five-day period expires, the silence of the Commission should be interpreted as approval of the transaction. As a result, the Commission has been very efficient in addressing these notifications. It has issued a decision within the established period in virtually all the merger cases that have come before it.²⁰¹

Failure to make the required notification to the Commission before proceeding with a merger may result in sanctions. According to the 1994 Annual Report of the Commission, in four occasions during 1993-94 companies involved in mergers were sanctioned for failing to report the transaction for review by the Commission.²⁰² Additionally, concentrations that do not require prior notification cannot be challenged by the Commission after one year of their occurrence.²⁰³

196. General Law of Mercantile Companies art. 224. "In this lapse of time [three months] any creditor of the merging companies may start summary proceedings to oppose the merger. . . ."

197. *Id.*

198. Competition Law art. 21.

199. *Id.*

200. *Id.*

201. Rogelio Lopez Velarde, *Antitrust in Mexico: A First*, INT'L BUS. LAW., Feb. 1995, at 85.

202. 1993-1994 ANNUAL REPORT, *supra* note 172, at 35.

203. Competition Law art. 22.

C. RESALE PRICE MAINTENANCE

Resale price maintenance is not a per se violation of the law. It can be a violation only if the company has market power, that is, the power to determine prices in all or in part of the country.²⁰⁴

The Competition Law does establish that the sharing of price information with the purpose of fixing prices is a per se violation of the law. The lists used by the company for purposes of setting the resale price should, therefore, be kept exclusively for internal company circulation.

D. APPLICABLE LAWS

- (i) *Constitución de los Estados Unidos Mexicanos*, article 28 (Mexican Constitution). The Mexican Constitution includes provisions against price-fixing and other anticompetitive practices.
- (ii) *Ley Federal de Competencia Económica*, of December 18, 1992 (Competition Law). The Competition Law regulates anticompetitive practices.
- (iii) *Ley General de Sociedades Mercantiles*, of August 4, 1934, articles 222-28 (General Law of Mercantile Companies). The General Law of Mercantile Companies establishes the formal requirements for mergers.

VI. Conclusion

Antitrust enforcement has traditionally been weak in Latin America. Of the countries reviewed in this article, Brazil and Chile have had relatively active antitrust enforcement. In the last two years, antitrust enforcement has become more prevalent in Mexico. Colombia's antitrust laws, as well as those of the Andean Pact, remain largely unenforced.

The opening of the economies of Latin America has generated a heightened awareness of the need to promote competition by creating regulatory frameworks conducive to that end. Paradoxically, the need for antitrust enforcement is dramatically reduced by the opening of the economies to international competition.

Antitrust regulation is a power tool for state intervention in the economy. If it is administered in an economically sound manner, it can promote competition; if it is enforced in an erratic manner, or without sound economic analysis, it can become a source of economic uncertainty and obstruction.

204. See *supra* notes 181-82 and accompanying text.

